IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 9, 2008 Session

GEORGE MICHAEL COLEY v. SONYA GAYE COLEY

Appeal from the Chancery Court for Robertson County
No. 19055 Laurence M. McMillan, Jr., Chancellor

No. M2007-00655-COA-R3-CV - Filed December 12, 2008

The trial court granted the parties a divorce and gave them equal parenting time and equal decision-making authority over their two children. The mother argues on appeal that the court's decision was inconsistent with its finding that the parents were incapable of agreement. She contends that as she is the one who has most consistently cared for the children she should have been awarded the primary role in caring for them and making decisions for them. We affirm the trial court's division of parenting time, but modify the parenting plan to give the mother more decision-making authority and to name her as the children's primary residential parent. In all other respects we affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Kimberley L. Reed-Bracey, Goodlettsville, Tennessee, for the appellant, Sonya Gaye Coley.

Larry D. Wilks, Springfield, Tennessee, for the appellee, George Michael Coley.

OPINION

I. BACKGROUND

George Michael Coley ("Father") and Sonya Gale Coley ("Mother") are the parents of Annika Coley and Cade Coley. Father is a high school history teacher and football coach in Robertson County. Mother is a high school science teacher and girls basketball coach in Sumner County. The record indicates that both parents are devoted to their children, but there were problems with their marriage, brought on at least in part because of Father's violent temper.

The last straw came on December 27, 2005. On that date, according to Mother's petition for an ex parte order of protection, Father committed acts of physical abuse against her. We do not feel it necessary in this opinion to describe the alleged abuse in any detail. Mother also alleged that she

and Father had several big arguments since June of 2005 and that he threatened many times to take the children away from her.

After the filing of the order of protection, Father moved out of the marital home in Cross Plains and rented a trailer in the same area. He filed a divorce complaint in the Chancery Court of Robertson County on January 6, 2006, citing inappropriate marital conduct and/or irreconcilable differences as grounds. A proposed parenting plan appended to his complaint requested that parenting time and parenting decisions be shared equally between Father and Mother.

Mother Answered and filed a Counter-Claim for Divorce on January 23, 2006. She alleged the same grounds as Father, as well as cruel and inhuman treatment. She asked the court to name her as the children's primary residential parent, to give her exclusive possession of the marital home pending a final hearing, and to order Father to pay child support and one-half of the house note. She also asked that Father be enjoined from using foul language around the children and that he receive counseling for his anger management problems.

The trial court conducted a hearing on January 30, 2006, after which it filed a *pendente lite* order granting Mother much of what she asked for. She was given temporary possession of the home and was named as the children's primary residential parent, with Father to have regular residential time with the children, including increased parenting time during the summer. Father was also ordered to pay Mother $518.37 per month as *pendente lite* child and spousal support.

The court also stated that all decisions regarding the children were to be made jointly by the parties. One point of contention involved their daughter's participation in Select Soccer, a soccer league which involves traveling to other schools for games. The daughter wanted to play Select Soccer, and Mother wanted to give her the opportunity. Father was opposed. However, the court's order declared that "[i]f either party does not agree to the extracurricular activity, the child shall not participate." The court also dismissed the order of protection "due to mutual combat" and enjoined both parties from threatening, harassing or intimidating one another, sternly declaring that, "[t]he Court warns both parties that violation of this restraining order *shall* result in jail time."*(emphasis in original order).*

While the *pendente lite* order did not end the combat between the parties, it seems to have had the beneficial effect of mostly confining their disagreements to the courtroom and to venues that could be monitored by the court. The parties participated in a Rule 31 mediation, but were unsuccessful in settling the issues between them. They both completed a Parenting Skills Seminar for Divorcing Parents, *see* Tenn. Code Ann. § 36-6-408, and they filed a number of motions in the trial court.

One particularly difficult issue involved the children's schooling. Both children had been attending Beech Elementary School in Sumner County. On July 13, 2006, Father filed a motion to have the children instead attend East Robertson Elementary School during the 2006-2007 school year. Mother was teaching at Merrol Hyde Magnet School in Sumner County. Father had previously taught in Sumner County, but was teaching at East Robertson High School.

Father reasoned that since East Robertson Elementary School was only half a mile from the marital home, the proposed change would simplify transportation and after school care. Mother responded by asserting that since the court's *pendente lite* order gave her the children on most weekdays during the school year and since she was teaching in Sumner County, it would be more beneficial for them to attend school closer to her place of work. At some point, Mother applied to have the children transfer to Merrol Hyde Magnet School, where she taught. Apparently, both children are academically gifted. The daughter was accepted, but Father was opposed to letting her go to the magnet school.

After a hearing on Father's motion and on Mother's response, which included a request that the court allow the daughter to play Select Soccer, the court set out its decision in an order filed on August 15, 2006. The court stood by its earlier decision as to extracurricular activities and declared that in accordance with that ruling the daughter could not play Select Soccer, although it also declared that "[t]he Court recognizes that the prior ruling is pretty harsh." The court also found that it was in the children's best interest that they attend the same school and ordered that they continue to attend Beech Elementary School. The court declared that,

> [I]f the parties reach a different agreement than what this Honorable Court orders today regarding the issue of school, the parties are free to do so. Thus far, however, these educators have been unable to agree, even though this is what they both do for a living.

It is notable that there were five separate places in that order where the court specifically made reference to the parents' inability to agree. In light of the ongoing disagreements between the parties, the court appointed a guardian ad litem to represent the interests of the children.

II. The Final Divorce Hearing

The parties filed several more motions prior to the final divorce hearing, which was conducted on December 19, 2006. Aside from the parenting plan, the only other issues raised at the hearing were those involving the division of marital property. Both parties were gainfully employed and earned roughly comparable salaries (although Mother's income was slightly higher than Father's). Alimony was not an issue.

Mother and Father were the only witnesses to testify. Their testimony showed that they were both devoted to the children and that the children behaved in a loving way towards them. The children were doing very well in school and had near-perfect attendance. Each parent appeared to be fairly consistent about timely transferring the children to the other parent in accordance with the trial court's order, and both took responsibility for making sure that the children were in school when they needed to be and that they completed their homework on time. Mother appeared to be generous with Father when it came to including him in activities involving the children during her own residential parenting time, while Father was less generous with her. Father admitted to several angry outbursts in the presence of other adults and of the children. He also admitted to losing his temper and throwing things, but in his testimony he tried to minimize the frequency and intensity of such episodes.

Mother testified that those episodes were more frequent than Father suggested. She also testified that she no longer desired to keep the marital home because she had decided to move to the Hendersonville area so she could be closer to her job and to the children's school. She stated that she wanted Father to remain involved in the children's lives. She asked the court to maintain the existing parenting schedule because she generally took more responsibility for the children than Father did, because the children were used to it, and because it worked fairly well.

At the conclusion of testimony the court asked the guardian ad litem for her observations and/or recommendations. The guardian ad litem stated that both parents were trying to do a good job of taking care of the children, that neither was unfit, and that there were no indications that the parents exposed the children to any risk of severe harm. She also stated that, unlike in many cases, the children did not appear to be affected by the ongoing antagonism between the parents. The guardian ad litem did not make a recommendation between the mother's desire to remain the primary custodial parent and father's request for a 50/50 parenting arrangement, but did make suggestions as to possible schedules to follow if the court chose a 50/50 arrangement. The court then took the case under advisement.

The trial court announced its decision in a Memorandum Opinion dated January 11, 2007, which included findings and fact and conclusions of law, and in the Final Decree of Divorce, dated February 21, 2007. The court declared the parties divorced pursuant to Tenn. Code Ann. § 36-4-129. The court ordered the sale of the marital residence, with the sale to be conducted by a special commissioner appointed by the court, and the net proceeds to be divided equally between the parties after various adjustments and offsets. The court also divided the other marital assets of the parties.

As for the all-important issue of a parenting plan, the court declared that a 50/50 shared residential placement arrangement would be in the best interest of the children. Each parent was to exercise 182.5 days of parenting time per year, to be implemented on an alternating two week schedule, which had proven to be a workable arrangement during the previous summer vacation. The court ordered that the alternating schedule would begin at the end of the school year and that until then the parties would continue the same parenting arrangement that the court had dictated during the *pendente lite* hearing of January 30, 2006.

The court also declared that all major decisions for the children, including education decisions and extracurricular activities, would be made jointly by the parties. However, each parent was allowed to make decisions regarding the day-to-day care of the child while the child was residing with that parent. Because the court's permanent parenting plan gave each party an equal amount of residential time and Mother's income was somewhat greater than father's, the application of the income shares child support guidelines resulted in a child support obligation of $129 per week, to be paid by Mother to Father. The court also ordered that Father take twenty-four anger management classes.

Mother filed a motion to alter or amend the trial court's decree. The court filed an amended order on March 19, 2007 which did make some modifications to its decree, but left the permanent parenting plan substantially unchanged. This appeal followed.

III. THE PARENTING PLAN

Parenting arrangements have been recognized as "among the most important decisions confronting a trial court." *Chaffin v. Ellis*, 211 S.W.3d 264, 286 (Tenn. Ct. App. 2006) (quoting *Rice v. Rice*, M1998-00973-COA-R3-CV, 2001 WL 812258, at *2 (Tenn. Ct. App. July 19, 2001)); *see also Curtis v. Hill*, 215 S.W.3d 836, 839 (Tenn. Ct. App. 2006); *Shofner v. Shofner*, 181 S.W.3d 703, 715 (Tenn. Ct. App. 2004). In making such decisions, the needs of the child are paramount, and the desires of the parent are secondary. *Chaffin,* 211 S.W.3d at 286. The determination of a parenting arrangement is fact driven, and the trial court must consider all of the facts and circumstances involved in reaching its decision. *Id.* A court-ordered parenting arrangement must give primary consideration to the child's best interest. Tenn. Code Ann. § 36-6-404(c)(3).

Pursuant to Tenn. Code Ann. § 36-6-404(a), any final decree in an action for absolute divorce involving a minor child must incorporate a permanent parenting plan. A parenting plan is defined in Tenn. Code Ann. § 36-6-402(3) as "a written plan for the parenting and best interests of the child, including the allocation of parenting responsibilities and the establishment of a Residential Schedule." The General Assembly has set out a list of factors that a court must consider in determining a residential schedule and designating a primary residential parent for minor children. These are:

> (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult;
> (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
> (3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child;
> (4) Willful refusal to attend a court-ordered parent education seminar may be considered by the court as evidence of that parent's lack of good faith in these proceedings;
> (5) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;
> (6) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;
> (7) The love, affection, and emotional ties existing between each parent and the child;
> (8) The emotional needs and developmental level of the child;
> (9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;
> (10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;
> (11) The importance of continuity in the child's life and the length of time the child

has lived in a stable, satisfactory environment;
(12) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;
(13) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;
(14) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;
(15) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and
(16) Any other factors deemed relevant by the court.

Tenn. Code Ann. § 36-6-404(b).

While the trial court is obligated to consider all the relevant factors in reaching its decision, it is not required to list in its opinions or orders each of those factors along with its conclusion as to how that factor affected the overall determination. *Woods v. Woods*, M2006-01000-COA-R3-CV, 2007 WL 2198110, at *2 (Tenn. Ct. App. Jul. 26, 2007) (no Tenn. R. App. P. 11 application filed); *Matlock v. Matlock*, M2004-01379-COA-R3-CV, 2007 WL 1452691, at *5 (Tenn. Ct. App. May 16, 2007) (no Tenn. R. App. P. 11 application filed) (citing *Bell v. Bell*, W2004-00131-COA-R3-CV, 2005 WL 415683, at *5 (Tenn. Ct. App. Feb. 22, 2005)); *Burnette v. Burnette,* No. E2002-01614-COA-R3-CV, 2003 WL 21782290 (Tenn. Ct. App. July 23, 2003) (no Tenn. R. App. P. 11 application filed).

Our courts have observed several times, however, that it would be helpful for the trial court to explicitly set out its factual findings in as much detail as possible so that we may review those findings under the standard of Tenn. R. Civ. P. 13(d), which accords a presumption of correctness to findings of fact unless the evidence preponderates otherwise. *See Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn.2002); *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn.1990). Where the trial court fails to make specific factual findings, there are no findings to which the presumption can attach, and we must conduct our own independent review of the record to determine where the preponderance of the evidence lies. *Curtis v. Hill*, 215 S.W.3d at 839.

Trial courts have broad discretion to make decisions regarding parenting arrangements, but those determinations must be made based on proof and applicable principles of law. *Chaffin*, 211 S.W.3d at 286; *D. v. K.*, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995). Given the discretion involved and the fact that the decision often hinges on witness credibility, "appellate courts are loathe to second-guess a trial court's conclusion." *Chaffin,* 211 S.W.3d at 286.

In the present case, the trial court specifically found that neither party was unfit and that neither posed a risk of harm to the children. The evidence does not preponderate against those findings, but the inquiry into what parenting arrangement would serve the best interests of the children does not end there. The court did not refer directly to the statutory factors, but the court's decision to order equal residential time leads us to assume that the trial court found those factors to

be in such balance between the parties that an equal division of residential time was warranted. The record does not preclude such a finding.

The children clearly have strong and stable relationships with both Mother and Father, and both parents are equally disposed to give the children the care that they need. The testimony of the parents also shows that both are willing to facilitate and encourage close relationships between the children and the other parent. Further, the parents have comparable jobs with similar hours, and thus both face similar challenges in making accommodations to balance their parental and professional duties. While it is true that Mother has taken a somewhat larger role in the care of the children by virtue of the court's *pendente lite* order, in light of both parents' fitness for parental responsibilities and of the discretion the trial court is authorized to exercise, we decline to second-guess the court's conclusion that a 50/50 division of residential placement is in the best interest of the children. We therefore affirm the residential schedule set out in the trial court's parenting plan.

However, another portion of the parenting plan is more problematic. With regard to parental decision making, Tennessee Code Annotated § 36-6-404(a)(5) provides that a permanent parenting plan shall:

> Allocate decision-making authority to one (1) or both parties regarding the child's education, health care, extracurricular activities, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan, consistent with the criteria in this part. Regardless of the allocation of decision making in the parenting plan, the parties may agree that either parent may make emergency decisions affecting the health or safety of the child.

In the case before us, the trial court found "that these parties, as coaches, were unable to agree on extra curricular sporting activities and these parties, as educators, were unable to agree on where the children should attend school." Despite their inability to agree, the court gave the parties equal decision-making authority, including decisions involving the children's education and their extracurricular activities. We find this decision inconsistent with the trial court's specific findings that the parties were unable to agree on a number of matters regarding their children.

In the case before us, the trial court required that both parties agree on any major decision, in effect giving either parent a veto over any new activity or opportunity that might become available to the children, regardless of whether that activity would be in the best interest of the children. So far, it has prevented the daughter from participating in Select Soccer and enrolling at Merrol Hyde Magnet School. The parenting plan legislation specifically recognizes that children's lives and needs change as they age and provides that a permanent parenting must "provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for further modifications to the permanent parenting plan." Tenn. Code Ann. § 36-6-404.

The children involved in this case will, like many other children, develop new interests, find new talents, and have opportunities to be involved in activities and programs that nurture those interests and talents. In many cases, the parents are reasonably able to reach a mutual agreement as

to which opportunities the child can take advantage of. Based on the record in this case, and based on the trial court's specific findings about the parents' inability to agree, we must conclude that joint decision making, requiring the assent of both parents to any new activity or program, simply is not in these children's best interest.

In such situations where the parents are unable to agree on matters of great importance to the welfare of their minor children, the primary decision-making authority must be placed in one parent or the other. In consideration of the entire record in this case, it appears to us that Mother is the most suitable person to exercise this important function. We are aware that Father is concerned that if decision-making is not equally split, Mother will make decisions that could negatively impact his parenting time with the children. We agree that Mother must avoid decisions which would make the court-ordered division of parenting time unworkable. Nonetheless, in making decisions, Mother should be primarily guided by the best interest of the children, not by the most convenient arrangement for Father.

As a final matter, the parenting plan legislation also provides that the residential schedule must include the designation of a primary residential parent. Tenn. Code Ann. § 36-4-402(5). The primary residential parent is defined as "the parent with whom the child resides more than fifty percent (50%) of the time." Tenn. Code Ann. § 36-4-402(4). Further, Tenn. Code Ann. § 26-6-410 declares that the designation of a primary custodian is necessary for all state and federal statutes and applicable policies of insurance which require a determination of custody, and provides that in the absence of such a designation, the party with whom the child is scheduled to reside a majority of the time shall be deemed to be the custodian.

In this case the trial court divided the parenting time equally, but neglected to name either party as the primary residential parent. Even where residential time is divided equally between the parents, the court must still designate one of the them as the primary residential parent. *Hopkins v. Hopkins*, 152 S.W.3d 447, 450 (Tenn. 2004). We therefore modify the trial court's final order to name Mother as the primary residential parent.

IV. PROPERTY ISSUES

Tenn. Code Ann. § 36-4-121(a) directs the courts in all cases of divorce or legal separation to "equitably divide, distribute or assign the marital property between the parties without regard to marital fault in proportions as the court deems just." *Jolly v. Jolly*, 130 S.W.3d 783, 785 (Tenn. 2004). Herein, Mother appeals the distribution of marital property, with specific reference to one asset.

The primary joint asset of the parties was the equity in the marital home. The parties estimated a value of between $175,000 and $200,000 for the home, with mortgage debt of about $128,000 on the property. The trial court ordered that the home be sold and that the equity be equally divided between the parties after deductions for the costs of the sale and various offsets to compensate for a number of post-separation transactions. Father was awarded $1,750 as an equitable share of the $3,500 Mother withdrew from the joint checking account of the parties, and $1,582 "to balance the inequity caused by the Wife's decision to claim both children as dependents, the entire

mortgage deduction and all of the charitable contributions on her 2005 income tax return." Mother was awarded reimbursement for household expenses incurred during the pendency of the divorce, in the amount of $675. The net result of these offsets was an award of $2,657 to Father to be paid from the sale of the marital home.

Both parties also owned several contributory retirement accounts, acquired during their teaching careers. At the time of trial, the total value of Father's retirement accounts was about $32,870. The total value of Mother accounts was about $28,831. In its division of marital property, the trial court declared that both parties would be entitled to retain their own retirement accounts, free from the claims of the other party.

Mother argues on appeal that since the value of Father's retirement accounts exceeded the value of her own retirement accounts by about $4,000, the court should have taken this discrepancy into account by ordering an additional offset of that amount to equalize the distribution of the marital assets. She cites the Supreme Court's opinion in the case of *Cohen v. Cohen*, 937 S.W.2d 823 (Tenn. 1996) which states that ". . . retirement benefits accrued during the marriage are marital property subject to equitable division even though the non-employed spouse did not contribute to the increase in their value." 937 S.W.2d at 830. We do not disagree that the retirement accounts are marital assets that must be included in the marital estate, and that the marital estate must be equitably divided.

However, an equitable division of marital property is not necessarily an equal division. *Bookout v. Bookout*, 954 S.W.2d 730, 732 (Tenn. Ct. App. 1997); *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988). The trial court's task is to make an equitable, or fair, distribution of property in light of the facts of the case and all relevant factors, including those set out in § 36-4-121(c). *Flannary v. Flannary*, 121 S.W.3d 647, 650 (Tenn. 2003). "The trial court is empowered to do what is reasonable under the circumstances and has broad discretion in the equitable division of the marital estate." *Keyt v. Keyt*, 244 S.W.3d 321, 328 (Tenn. 2007) (citing *Flannary*, 121 S.W.3d at 650). Because the division of marital property is "not a mechanical process," and because decisions regarding division of marital property are fact-specific and many circumstances surrounding the property and the parties play a role, a trial court has a great deal of discretion concerning the manner in which it divides marital property. *Keyt*, 244 S.W.3d at 328; *Jolly*, 130 S.W.3d at 785; *Flannery*, 121 S.W.3d at 650; *Smith v. Smith*, 984 S.W.2d 606, 609 (Tenn. Ct. App. 1997).

As a general matter, reviewing courts will evaluate the fairness of a property division by its final results. *Thompson v. Thompson*, 797 S.W.2d 599, 604 (Tenn. Ct. App. 1990). Further, "unless the court's decision is contrary to the preponderance of the evidence or is based on an error of law, we will not interfere with the decision on appeal." *Sullivan v. Sullivan*, 107 S.W.3d 507, 512 (Tenn. Ct. App. 2002)(citing *Goodman v. Goodman*, 8 S.W.3d 289, 298 (Tenn. Ct. App. 1999)). Thus, appellate courts ordinarily defer to the trial court's decision unless it is inconsistent with the factors in Tenn. Code Ann. §36-4-121(c) or is not supported by a preponderance of the evidence. *Jolly*, 130 S.W.3d at 785-86.

We cannot conclude that the trial court's distribution of marital property is inconsistent with

the statutory factors, not supported by the evidence, or based on an error of law. Accordingly, the trial court's declining to include the difference in the value of the parties' retirement accounts in the offsets it applied to the division of the equity in the marital home was not error. We also do not believe the final results of the division were inequitable, even though it left Father with a slightly greater share of the marital assets than Mother. We therefore affirm the trial court's property division.

V.

The parenting plan adopted by the trial court is modified to give Mother primary responsibility for major decisions affected the welfare of the parties' minor children. The trial court is also directed to amend its final order to name Mother as the children's primary residential parent. In all other respects, the trial court's order is affirmed. We remand this case for any further proceedings necessary. Tax the costs on appeal equally between Mother and Father.

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PATRICIA J. COTTRELL, JUDGE